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Naval Warfare : Law

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NAVAL WARFARE: LAW AND LICENSE

BY
T. BATY

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In view of recent discussion, there may be some topical interest in this paper, published in 1916. It is accordingly forwarded with respectful compliments.

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NAVAL WARFARE: LAW AND LICENSE

If any one having an elementary acquaintance with the law of nations had been asked, twelve years ago, what were the rights of belligerents and neutrals in naval warfare, he would not have been at a loss for a reply. Subject to one or two minor points of unsettled detail, he would have been quite clear and certain as to the position. A continuous series of cases and textbooks made it plain. If some went further than others in claiming extended neutral immunities, that was a point of academic argument which was perhaps of interest, but of no particular importance, except as showing that the trend of thought was on the whole unfavorable to the belligerent.

In twelve short years the system has been broken down which had lasted for two hundred and fifty, and had stood the test of repeated great wars. The beginnings of decay—the little rift which was to make the harmony of law mute and voiceless, are to be found in the judgment of Salmon P. Chase, Chief Justice of the Supreme Court of the United States, in the cases of the *Bermuda* and the *Springbok*. It is very extraordinary that no dissentient opinion was published. The minority of the Supreme Court contained that true successor of Marshall, Kent and Story, Samuel Nelson. No analysis of the voting appears in Wallace's *Reports*. But from other sources[1] we know that Nelson carried with him Wayne, Clifford, and Swayne (afterwards Chief Justice), whilst Grier, Davis and the two junior judges went with Chase, who had himself only just been raised to the bench. His judgments are less regarded than those of many other Chief Justices of the United States, says Professor Gregory, of Columbia, because, we are told, his "consuming ambition for the presidency" and his political activities diverted his attention from his judicial duties.

It is almost certain, *a priori*, that the decision of such a majority would be wrong. And wrong it surely was in these instances. It broke down the traditional American encouragement of peaceable merchants

[1] See the writer's Prize Law and Continuous Voyage, pp. 89, 111.

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which Jefferson and Franklin had established as a canon of American policy. Shortly to state his view, Chase made the supposed intention of aiding the enemy's forces the sole test of contraband or breach of blockade. He accordingly (1) admitted extraneous evidence, contrary to the rule which made the guilt of the ship and cargo depend, in these extraordinary processes, on her own admissions; (2) rejected the rule which absolutely required, as a condition of confiscation, an avowed destination to an enemy port; (3) adapted and extended the list of contraband so as to include anything that an army might find useful, from buttons to quinine.

His first innovation only a lawyer, trained to know the importance of evidence and costs, could appreciate. His third was universally rejected. His second—generally repudiated so far as blockade was concerned—was more leniently regarded when contraband was in question. And this fatal leniency drove home the wedge. The lenient critics had for the most part in mind the "absolute" variety of contraband only. Insisting on the absolute limitation of contraband to guns, rifles, explosives and the like, they were not very much concerned if such cargoes were cut off from neutral ports. Unpractical and pedantic, they conceded the points that captors might give evidence, and that the theoretical "intention" that the goods should ultimately aid the enemy should condemn. They sold the key of the pass. These two practical safeguards (the common law of Europe from time immemorial) once thrown away, neutral safety had been bartered for nothing. All that remained was for belligerents to insist on enlarging the list of contraband articles. And to this the theorists could not object. For they had agreed (1) that the "intention" was decisive; and (2) that any evidence might be adduced to prove it. After that there was no sense or logic in saying that if you may stop bayonets because they are meant to help the enemy, you may not stop quinine or potatoes. The very *raison d'être* of the former rule which limited the category of contraband to markedly military articles, was to avoid the necessity for disputes about intention. Once it was admitted that disputes about intention were precisely what it was the business of a prize court to try, there was evidently no point in restricting its laudable activities. A prize court must act summarily, or it does injustice. It cannot act

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summarily if it tries cases like a court of common law. But if it has made up its mind to abandon its functions of deciding summarily on the ship's own evidence, and to behave like a court of *nisi prius*, there is no reason why it should stop short in its novel career. Chief Justice Chase was logical, and did not stop short. The pedants were mistaken in thinking that other tribunals would.

But for a long time no occasion arose. The French proclamation declaring rice contraband in 1885 was never acted upon, nor accepted by any prize court, and was quoted by authors only as a strange aberration—a sort of specimen hung up for admiration in a moral museum, like a white blackbird. Bismarck's speech to an inconvenient deputation of merchants, in which he declined to quarrel with France on their account, telling them that the exclusion of provisions might sometimes be a legitimate means of warfare, was certainly not meant as an exposition of the law of contraband. Probably he meant no more than this—that by proper means (e. g., a blockade) provisions could be excluded from China by France, so that it was impossible to rely on any natural and immutable right to import them. We know that on another occasion the Prince flatly declared that saltpetre could not possibly be contraband, since it was incapable of direct use in war, and needed to undergo a process of manufacture. In the South African War of 1900 and in the Abyssinian-Italian War of 1896 the question of transport to a neutral port did arise. In both cases the incriminated cargo was restored or compensation paid. On the whole, therefore, the ancient doctrines were maintaining their ground. Pillet and Despagnet-Bolck assert them no less than Kleen Hall persisted that the American decisions would probably find no defenders even in America.

Then came the Russo-Japanese War of 1904–5. It found an ignorant world, which had forgotten its rights. An extended list of contraband was published by the Russian Admiralty. Neutral destinations were disregarded. Captors' evidence was *de rigueur*. Neutral ships were destroyed.

Abraham Lincoln had certainly never contemplated this last behavior. He might well have desired to keep up a blockade of the Southern ports by the expeditious process of firing on everything that approached. But neither he nor Semmes of the *Alabama* harmed a neutral

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ship (except for resistance to visit). Evidently, neutral trade was now in a parlous case. And all this time the absolute immunity of the enemy's own goods on board a neutral carrier was loudly proclaimed as an axiom of international intercourse!

The force of folly could no further go. The war of 1914 saw the new pretensions uncountered and even approved. The Naval Conference of London had discussed and regulated them. It had even given an implicit sanction to the belligerent claim to strew the high seas with engines of destruction. The weaker Powers had been excluded from that august discussion, in which the only thing which counted was military force. Holland and Spain were there, indeed, but they did not count.

How the claim to appropriate the high seas as a mine-field has led to the claim to appropriate them as a "military zone" into which the neutral ship ventures at its peril: how the claim to capture grain and ore as contraband has developed into the claim to exclude all trade with an enemy according to the practice of the sixteenth century, all this is fresh in the recollection of our readers. The old questions of 1793 and 1807 are revived almost in their original form.[2] The enormities (and they are many) of Germany are recounted to justify retaliation upon America, Spain and Sweden. A freedom from judicial subtleties is claimed which might have satisfied Brennus or Lynch, Fouquier-Tinville or Bethmann-Hollweg.

"Hard cases make bad law." The natural sympathy for the Allies, contending for all that peaceable countries and small countries and free countries hold sacred, will be misplaced if it ends in handing over the high seas as the sole preserve of belligerents.

We are told, indeed, that the new conditions of commerce render imperative an abandonment of the old and established rules.

It may be so. If it be so, the change must be accepted by all, and not dictated by a few. It must be so definite and obvious as to be accepted by common good sense. But no such general acceptance can

[2] The reader of modern debates on "Tightening the Blockade" will be amused to read in Cobbett's Parliamentary Debates, the speeches of 4 February, 1807 which afford an exact parallel to them of today. (Vol. 8, col. 620.) See also the debates of 1808–9, s. v. "Orders in Council," *ibid.*, Vols. 9, 10, 11, 12.

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even be thought to exist in favor of the abandonment of the ancient principles of prize law, which the powerful nations would be, and are, the first to maintain against small warring communities. And the fact is, that no revolution is required. The stock allegation is that neutral trade must be attacked because railway transport is so swift and easy. The statement will not bear examination. Railway lines, especially in war time, are apt to become congested. Much of the delay of transport is involved in loading and unloading at terminals, and in the delay of waiting for dispatch. Railways are not a magician's rod. On the other hand, the modern belligerent is provided by science with a far more effective means of interrupting commerce than the frigate or brig which was equally dependent with her prey on the wind and the weather. The modern cruiser can overhaul anything. Thus the neutral is subject to a control of a stringency of which the casual eighteenth and early nineteenth century knew nothing. According to the *Naval Annual*, Great Britain possessed in 1914 some 118 effective cruisers (besides torpedo boat destroyers, ocean-going and other, over 200 in number), none of which fell below 19 knots in speed. Sixteen were of 29 knots. Four were of 26 knots. Twenty-four were of 25 knots. Four were of 24 knots. Eighteen were of 23 knots. Twelve were of 22 knots. Five were of 21 knots. Sixteen were of 20 knots. Nineteen were of 19 knots: 118 in all.

Whilst of the world's oceanic shipping, setting aside some 23 "fliers" of 20 knots and over, it may roughly be said that 20,000 vessels are of 10 knots and under, 2,000 of from 10 to 12 knots, 200 of from 12 to 19 knots, and 20 of 19 knots. It is a mistake to suppose the ordinary passenger and cargo liner to the East or to South America to be comparable in speed to the few exceptionally fast boats which ply between Europe and New York. A speed of 15–17 knots is common and sufficient. There is therefore scarcely any merchantman which is not at the mercy of any cruiser: and none which is not at the mercy of many.

Because a new weapon, like the submarine, is invented which cannot be used as effectively as it otherwise might without disregarding the accepted rules of law—that is not a reason for discarding those rules. It is a reason for discarding the weapon. No passing advantage can

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compare with the danger of encouraging the idea that the law of nations is a toy blown about by every blast of circumstance.

What is really a novel development, explaining (if it is far from justifying) the extraordinary latitude which belligerents are assuming, is the recognition that has been accorded to the shocking practice of mine-laying on the high seas. By a cool process of assertion the military Powers invested this abominable outrage on humanity with a color of legality. When once it was recognized that the open sea could be mined, the appropriation of the open sea—the highway of neutrals—as a monopoly of combatants was sure to follow. It is impossible to allow waters to be denied to the British fleet. If they are mined by an enemy, they must be cleared. And in bringing to bear the necessary powers of clearance, there is a great temptation, to say the least, to protect the operations by counter-mine, and to exclude neutrals from the wide areas of water affected. The idea of a "zone of operations" apparently took its rise in a phrase of Lord Lansdowne, uttered in relation to a different subject. Interference with British commerce during the Russo-Japanese War might, he suggested, be fairly restricted to the "zone of operations" in the Far East. Russia, it will be remembered, had seized the *Malacca* in the Red Sea: and it was desired to place some limitation on the recurrence of these incidents. The suggestion of a limited zone for the exercise of war rights, though received with much favor in the uninstructed press, the Russian declined with thanks: and it is obvious that no belligerent will resign the right to stop illicit trade at its source. But the conception of a "military zone" seems to have appealed to those responsible for the conduct of naval operations. Without acknowledgments to Lord Lansdowne, the principle was utilized to cover a declaration warning neutral vessels against cruising, in order to obtain information, in the zone of hostilities. Now a vessel which cruises about in order to obtain information to assist the enemy is doing a hostile thing, and is clearly liable to be dealt with as an enemy ship. But a neutral which chooses to visit the scene of hostilities for her own purposes—whether they be to obtain information for the neutral public, or for the gratification of private curiosity, is using her strict rights. She is on her own ground, and no admiral has any right to treat her people as spies or to

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exercise any authority over her, other than to send her in for adjudication in a proper case of grave suspicion of enemy control.

The vague suggestion, for which Lord Lansdowne was thus, it would seem, responsible, of a "zone of operations," in which the normal rights of neutrals are in a greater or less degree superseded by the dictation of belligerents, was a novelty. No such idea was known to the nineteenth century. Throughout its course, the seas were free to all. It was reserved for the twentieth, in its humanitarian fervor of progressiveness, to concede to a combatant that he might exercise dominion over the high seas.

The creation of "a military zone" in the North Sea, announced by the British Admiralty in early October, was not very clearly set forth.

On 3d October, 1914, it was announced by the Secretary to the Admiralty that the German policy of mine-laying, combined with the German submarine activities, made it "necessary" for the Admiralty to adopt counter-measures. We do not complain of the hazy language here exhibited, but we are sceptical as to the necessity which can justify the appropriation of the North Sea by any combatant, any more than it could justify the invasion of Belgium. The Admiralty, however, proceeded to warn ships that it was unsafe to cross the area between lat. 51° 15′ N. and 51° 40′ N. and long. 1° 35′ E. and 3° E.—whilst at the same time not encouraging the supposition that the navigation of the southern part of the North Sea was safe anywhere.

Essentially, the germ of a paper blockade lay in this announcement. For if a belligerent may always render any given area of sea unsafe for neutrals, he can obviously effect the exclusion therefrom of all traffic. Ships are more effectively warned off by the threat of automatic destruction than by the threat of capture and prize litigation. This facilitation of paper blockades was pointed out several years ago in the *Révue de Droit International* as an obvious consequence of the detestable new policy of submitting to the validity (under circumstances of "necessity") of the destruction of neutral prizes—a violent act which had never disgraced the most arrogant commander until the dawn of the twentieth century. Unfortunately, by refraining from claiming more than the mere net value of hull and freight in the case of the *W. P. Frye*, sunk

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by a German cruiser, the United States in a measure encouraged destruction. They claimed nothing in respect of the injury done to all American shipping by the German blow at its security.

For the moment, matters took no fresh turn. The American note to Great Britain, presented in December, 1914, dealt almost exclusively with the delays and supposed injustices occasioned by our enlarged interpretation of the idea of contraband. But in the new year it was announced (27th January) that the German Government would, as from 1st February, take over the whole of the food stocks of the country. This, though alluded to by a legal correspondent of *The Times* (London) as creating a situation unprecedented in international law, had a very precise analogy in the measures adopted by the French revolutionary government in 1793. De Marten's *Causes Célèbres* devotes a whole section to that affair. It is universally recognized that the American and Danish protests against the pretension that foodstuffs became contraband because the government had taken control of their distribution, were thoroughly justified. It cannot be inferred that because food is to be under the control of a government department, therefore it is necessarily destined for naval or military use. That the Declaration of London asserts that it can be so inferred, only demonstrates the fatuity of that instrument.

But it was announced that His Majesty's Government would lay hold of the new German declaration (afterwards explained away) in order to treat cargoes of food for Germany as contraband. This supposed intention raised a storm of indignation in the German Empire: the direct outcome of which was the celebrated declaration of 4th February. It is proper to remember, however, that *before* that declaration, a raid had been made (on 30th January) by German submarines on British shipping in the Irish Sea (the *Ben Cruachan, Linda Blanche* and *Kilconn* being sunk). Simultaneously with a cautiously worded statement issued by the British Foreign Office on 4th February, which confirmed the suspicions of those who believed that the government proposed to invite the prize court to treat food as contraband (while illogically according an ostentatious exemption to the carriers), the text of the Berlin declaration was reported in Amsterdam (*The Times*, 5th February). It was justified as a retaliation upon neutrals for their

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failure to prevent the British from acting on their enlarged conceptions of contraband.

Its terms affected to proclaim the British seas a "war area," in which all British ships would be sunk at sight, and in which no neutral ship could therefore reckon on safety "on account of the uncertainties of naval war."

Of course, as a blockade, this was ridiculous. It was hopelessly ineffective. It was not intended as a proclamation of blockade; but as an attempt to get the benefits of blockade in another way. Whatever we may think of the destruction of an enemy's merchant-ships without trial and without any attempt to save life, there can be no two opinions that to destroy neutral ships in this manner is flatly illegal. The Doggerbank case between England and Russia in 1905 shows that "accidental" destruction of neutral vessels is always and everywhere a wrong for which only prompt reparation and apology, coupled with security against repetition, can atone.

The British reply was to interdict all trade with Germany: and it was justified on the ground of retaliation. As a retaliation against an indefensible German atrocity, it is well capable of being sustained. But it strikes equally at neutrals, who are entitled by the law of nations to continue to trade with Germany. We have no right to retaliate upon them. In doing so, we commit precisely the old error of the Orders in Council of 1807, which it was thought had passed into the limbo of buried mistakes. Nothing did us more harm, for less corresponding good, than the pretension in 1807 to treat the ocean as a preserve, and to interdict neutral trade at our pleasure. It created the legend of a selfish Britain. "Illegality," says a warm admirer of Britain (Dr. T. A. Walker of Cambridge), "was met with illegality." A sympathetic neutral like America was driven into non-intercourse and then into war. On 11th March, 1915, the Order in Council was made. It was not published until the 15th March.

The mysterious Order goes beyond even the Orders in Council of 1807, for it throws upon the judge of the court the fulfilment of a purely political function—the determination of what is to be done with the intercepted cargo or its proceeds. The court has nothing to guide it. The voyage was innocent: the terms on which the innocent neutral is

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to get back his goods, or such sum as they may have been disposed for, over his head, are to be such as the court thinks just. Is the court by penalties to discourage such voyages? Is it by penalties to discourage dilatoriness or recalcitrance on the part of neutrals? Is it to treat them more favorably according to the greater or less friendliness of their governments? If it is to make no such discriminations, why is the latitude left to it? If it is to make them, why is such a duty imposed on a judge of prize? He is dragged into the arena of state policy, when he ought to sit serene above it. George III never asked Sir W. Scott to pronounce on the conduct of neutrals. He told him flatly to condemn them if they traded with France. That was a clear proposition of fact, capable of precise ascertainment: in short, a question for a judge. Questions of how to deal with neutrals in one or another set of circumstances are questions, not for a court, but for a Cabinet.

The American note of March treated the measure as a blockade, which it did not pretend to be (though the British Cabinet now seems inclined to justify as it such), and hoped that it would be kept within the accustomed limits of blockade, which there was no reason to suppose it would. The United States Government appeared to be pleased with the unjudicial latitude entrusted to the judge. But though it is well to leave it to a judge to apply the law to new facts, it is not well to leave it to him to make new law to the government's piping.

Mr. Page, the American Ambassador, has signalized other ambiguous features of the Order. What is meant by the "produce" of Germany? Is a packet of dye, made in Germany, the "produce" of Germany after it has been the subject of a *bona fide* sale and actual completed delivery to an Italian firm, and is then exported by them from Italy? What is an enemy "destination"? an immediate definite enemy purchaser?—an immediate enemy market?—or a possible hypothetical enemy use? How can innocent neutral goods be "requisitioned" [3] under the bare authority of an Order in Council?

No one can say. That may be why the Government have left such a free hand to the judge. Perhaps he is expected to appraise the conduct of neutrals somewhat as he apportions the degree of blame in a collision case—and to find them conformably with the directness of

[3] Cf. the cases of the *Antares* and the *Zamora*, 31 Times Law Reports, pp. 290, 513.

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their intercourse. But the whole diliquescent proceeding, afraid of direct and plain statement, sheltering itself under the skirts of the court, and hiding the policy of the statesman behind the robe of the judge, is characteristic of our age. We have no Castlereagh: nor even a Perceval. The only unambiguous feature of the Order is that it finally abandons all pretence at observing the terms of the Declaration of Paris. "Every merchant vessel * * * carrying goods which are enemy property, may be required to discharge such goods in a British or allied port. Any goods so discharged * * * shall, if not requisitioned for the use of His Majesty, be restored by order of the court, *upon such terms as the court may in the circumstances deem to be just, to the person entitled thereto.*" It is inconceivable that the court, after enemy property has carefully been brought under its jurisdiction, will "consider it just" with equal care to let it go again. If the provision means anything, it means that enemy goods will no longer be safely laden on a neutral ship. There is no doubt that they will be requisitioned or sequestrated, and that so long as the war lasts, they will not be paid for. So the Declaration of Paris follows the Declaration of London into the sphere of ancient history and the neutral flag no longer "covers" enemy property.

Lord Crewe's declaration, made on December 21, 1915, to the effect that the Order only meant that, "subject to the accepted principles of international law, every conceivable effort would be made to prevent *goods that mattered* entering or leaving Germany," and that "surely no one can imagine that when Mr. Asquith said that goods of all kinds should be kept out of Germany, he meant to tear to ribbons all the accepted rules of international law," can only evoke respectful wonder. If the Order was only meant as a vigorous affirmation of the ordinary law, it was certainly not calculated to be so interpreted.

T. BATY.

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